

## Children's rights and gender identity: a new frontier of children's protagonism?

Article (Published Version)

Ammaturo, Francesca Romana and Moscati, Maria Federica (2021) Children's rights and gender identity: a new frontier of children's protagonism? *Nordic Journal of Human Rights*, 39 (2). pp. 146-162. ISSN 1891-8131

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/103602/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

### **Copyright and reuse:**

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.



## Children's Rights and Gender Identity: A New Frontier of Children's Protagonism?

Francesca Romana Ammaturo & Maria Federica Moscati

To cite this article: Francesca Romana Ammaturo & Maria Federica Moscati (2021) Children's Rights and Gender Identity: A New Frontier of Children's Protagonism?, Nordic Journal of Human Rights, 39:2, 146-162, DOI: [10.1080/18918131.2021.1997028](https://doi.org/10.1080/18918131.2021.1997028)

To link to this article: <https://doi.org/10.1080/18918131.2021.1997028>



© 2021 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 22 Dec 2021.



Submit your article to this journal [↗](#)



Article views: 112



View related articles [↗](#)



View Crossmark data [↗](#)

# Children's Rights and Gender Identity: A New Frontier of Children's Protagonism?

Francesca Romana Ammaturo<sup>a</sup> and Maria Federica Moscati<sup>b</sup>

<sup>a</sup>School of Humanities and Social Sciences, University of Roehampton, London, UK; <sup>b</sup>School of Law, Politics and Sociology, University of Sussex, Brighton, UK

## ABSTRACT



This article adopts the concept of *protagonismo infantil* (children's protagonism) to argue that children's voices on gender identity need to be centred in order to fully empower trans and non-binary children. In this field of children's rights, *protagonismo infantil* enables the law to act as a malleable frontier rather than as a rigid boundary. Topics concerning gender and sexuality do not feature prominently among the legal, social, and medical issues most widely discussed in terms of children's rights. When they are approached, such topics are treated as marginal, controversial, and divisive. The dominant approach is to deny and disregard any possibility for children's self-identification in terms of gender and/or sexual orientation, and to 'wait and see' until an older age – in some cases, adulthood. Yet every child is sexed and gendered at birth by medical and legal practitioners and parents, and gender and sexuality are core aspects of every individual's sense of self and identity. Focusing mainly on the United Nations Convention on the Rights of the Child (UNCRC), this article encourages new debate on how children can be empowered to affirm their own gender identity through the use of *protagonismo infantil*.

## KEYWORDS

Children's rights; gender identity; children's protagonism; empowerment; human rights

## Introduction

This article<sup>1</sup> shares some initial reflections on the role *protagonismo infantil*<sup>2</sup> (children's protagonism) plays in advancing children's rights concerning their gender identity.<sup>3</sup> We argue that, in relation to children's rights and gender identity, the law – both United Nations Convention on the Rights of the Child (UNCRC) and national law – is often configured as a boundary rather than a frontier, and that this effectively forecloses

**CONTACT** Francesca Romana Ammaturo  francesca.ammatturo@roehampton.ac.uk  Sociology and Human Rights, School of Humanities and Social Sciences, University of Roehampton, Roehampton Lane, London SW15 5PU, UK

<sup>1</sup>Although the article is a collective work, each co-author took the lead in producing the first draft of a selection of sections, as follows: Ammaturo worked on the sections 'A Difficult Conversation', half of the section 'Navigating the Dichotomy', and half of the section on 'Critical Approaches'; Moscati worked on half of the section 'Navigating the Dichotomy', half of the section on 'Critical Approaches' and the entire section on 'Centering Children's Voices'. We contributed equally to the drafting of the introduction and the conclusion.

<sup>2</sup>M Liebel, 'Paternalism, Participation and Children's Protagonism' (2007) 17(2) Children Youth and Environments 56.

<sup>3</sup>We use 'children' as a comprehensive term that includes any person below the age of 18.

© 2021 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

meaningful conversations on the rights of trans and non-binary children. Thus, building on an intention to decolonise knowledge about children's rights beyond the currently dominant protectionist and paternalistic approach, the article adopts the concept of *protagonismo infantil* to argue that children's voices on these issues need to be brought in from the margins to the centre in order to fully empower trans and non-binary children,<sup>4</sup> and to make the law a frontier. *Protagonismo infantil* indicates processes whereby children actively produce knowledge and take a leading role in decision-making.

Topics concerning gender, sex, and sexuality do not feature prominently among the issues most widely discussed around children's rights. When such topics are approached, they are treated as marginal, controversial, and divisive, and the dominant approach is to deny and disregard any consideration relating to children's gender identity and/or sexual orientation,<sup>5</sup> and to 'wait and see' until an older age – in some cases, adulthood. Yet every child is sexed and gendered at birth by the law, medical practitioners, and parents, and gender and sexuality are core aspects of every individual's sense of self and identity. Despite the exponential growth of related literature over the past few years, there is a pressing need to address the issue of children's rights and gender identity because it remains a sphere in which the rights of children continue to be under-theorised and under-protected.

Given this article's scope and interdisciplinary nature, it does not offer a comparative legal analysis of how legal systems deal with the rights of trans and non-binary children. Instead, it focuses on how children can be empowered through the concept of *protagonismo infantil* which can transform the law into a malleable and dynamic frontier rather than a rigid boundary. Medical and legal approaches in this field tend to mirror each other in terms of their intended outcomes, so no distinction is offered for the purpose of this discussion.

The article is divided into four sections. Firstly, it introduces the socio-legal framework around children's rights and gender identity, focusing on the main critical aspects of the debate. Secondly, it looks at the conceptualisation of children's rights on gender identity as a frontier, arguing that the law is often configured as a boundary rather than as a frontier, and that this effectively forecloses meaningful conversations on the rights of trans and non-binary children. Thirdly, the article affirms the necessity of adopting an intersectional and decolonial interpretation of children's rights in relation to gender identity, as current discussions on this topic are often mono-dimensional and Western-centric. Lastly, it considers the importance of shifting the current approach to gender identity and children's rights from 'participation', as enshrined in Article 12 of the Convention on the Rights of the Child, to *protagonismo*. We consider such a shift as conducive to a fuller realisation of children's rights in relation to gender identity than contemporary paradigms of protection, which often sideline children's wishes in favour of parental decisions and render children invisible.

<sup>4</sup>Throughout the article, we will use the expression 'trans and non-binary children' to designate a heterogeneous group of children and young people whose gender identity does not align with the one assigned to them at birth. The gender identity of the children in question may or may not fall within the gender binary.

<sup>5</sup>The reference to sexual orientation in the article is purely incidental, as we do not have the space to address this important issue.

We are conscious that the creative process of writing this article did not involve trans or non-binary children, which represents a limitation. However, this endeavour is just the first stage of an ongoing research project which looks at how trans and non-binary children can be at the centre of discussions on their gender identity.

Ultimately, this article seeks to contribute to the development of children's rights in relation to gender identity and calls for a critical appraisal of the current barriers or boundaries emanating from the UNCRC and national law when gender identity is under consideration.

## A Difficult Conversation: Children, Gender Identity, and Human Rights

As Kennedy<sup>6</sup> has observed, while discourses in the media tend to frame the issue in sensationalist and novel terms, research shows the existence of trans children since at least the beginning of the twentieth century.<sup>7</sup> Although attention to the lives, experiences, and rights of these children may be relatively recent, their struggles are not, and their realities have been ignored for far too long. While the debate on the rights of trans and non-binary children is now firmly in the spotlight, it often seems difficult to disentangle the widespread rhetoric of moral panic<sup>8</sup> around these issues from a genuine desire to comprehend and protect the children's rights.

For this article, we refer to trans and non-binary children as individuals below the age of 18 years who are aware of their gender as being different from the gender assigned at birth. As Redcay and others have argued,<sup>9</sup> children become aware of their gender identity between two and four years of age.<sup>10</sup> Trans and non-binary children cannot easily be treated as a unitary group, as their needs and experiences may vary greatly,<sup>11</sup> not least because not all children identify within the gender binary. This heterogeneous group of children have traditionally been labelled as 'confused', pathologised, and considered in need of medical treatment to suppress their gender nonconformity.<sup>12</sup> This is often the product of the 'social discomfort'<sup>13</sup> associated with any departure from binary gender expressions, but also to the fact that parents are put under a lot of pressure to 'normalise' the child in relation to their gender.<sup>14</sup> As a result, trans and non-binary children may remain unheard, as well as rendered invisible by their parents, carers, and

<sup>6</sup>N Kennedy, 'Deferral: The Sociology of Young Trans People's Epiphanies and Coming Out' (2020) *Journal of LGBT Youth*, doi:10.1080/19361653.2020.1816244.

<sup>7</sup>J Gill-Peterson, *Histories of the Transgender Child* (University of Minnesota Press 2018), quoted in N Kennedy, 'Deferral: The Sociology of Young Trans People's Epiphanies and Coming Out' (2020) *Journal of LGBT Youth*, doi:10.1080/19361653.2020.1816244.

<sup>8</sup>KH Robinson, 'In the Name of "Childhood Innocence": A Discursive Exploration of the Moral Panic Associated with Childhood and Sexuality' (2008) 14(2) *Cultural Studies Review* 113.

<sup>9</sup>A Redcay and others, 'The Arc of Justice: Examining Policies and Laws to Advance the Human Rights of Transgender and Gender Expansive Children' (2019) 4(3) *Journal of Human Rights and Social Work* 156.

<sup>10</sup>For a comparison between the development of gender identity in trans and cisgender children please see S Gülgöz and others, 'Similarity in Transgender and Cisgender Children's Gender Development' (2019) 116(9) *Proceedings of the National Academy of Sciences* 24480.

<sup>11</sup>E Schneider, *An Insight into Respect for the Rights of Trans and Intersex Children* (Council of Europe 2013) 9.

<sup>12</sup>KR Olson, 'Prepubescent Transgender Children: What We Do and Do Not Know' (2016) 55(3) *Journal of the American Academy of Child and Adolescent Psychiatry* 155.

<sup>13</sup>A Redcay and others 'The Arc of Justice: Examining Policies and Laws to Advance the Human Rights of Transgender and Gender Expansive Children' (2019) 4(3) *Journal of Human Rights and Social Work* 156.

<sup>14</sup>E Schneider, 'Trans Children: Between Normative Power and Self-Determination' in E Schneider and C Baltes-Löhr (eds), *Normed Children: Effects of Gender and Sex Related Normativity on Childhood and Adolescence* (Transcript Verlag 2018) 167–88, 173.

institutions, including education, legal, and/or healthcare systems. While legal gender recognition<sup>15</sup> and medical treatment for trans and non-binary<sup>16</sup> children represent the two main issues dealt with in the current literature, there are also implications for the human rights of these children in other spheres.<sup>17</sup>

When it comes to the medical treatment and legal recognition of trans children, Schneider<sup>18</sup> gives a comprehensive overview of the three predominant current approaches, focusing on Europe. The first is a ‘normalising’ approach in which an attempt is made to realign the gender identity of the child to that assigned at birth, despite the child’s manifest declaration of their own gender. As Schneider argues, this involves both openly disregarding the child’s own wishes and firmly (re)inforcing the gender binary.<sup>19</sup> The second is the ‘avoiding’ approach, based on avoiding and altogether ignoring any engagement with the child’s expressed wish to be recognised in a gender different from that assigned at birth. This approach is mistakenly considered ‘neutral’, while actually having important repercussions on the child’s well-being.<sup>20</sup> Lastly, the ‘affirming’ approach encompasses various initiatives aimed at recognising and supporting the child’s gender identity.<sup>21</sup> This could manifest in various forms of ‘social transition’,<sup>22</sup> when requested, and/or medical treatment with the provision of so-called ‘puberty-blocker’<sup>23</sup> drugs and, later on, only if desired and agreed upon under medical supervision, ‘cross-sex hormones’.<sup>24</sup> Currently, ‘affirming’ approaches are relatively rare, with only a handful of countries globally allowing medical treatment and/or legal gender recognition during childhood.<sup>25</sup>

While the ‘affirming’ approach is increasingly approved by medical practitioners as protecting trans children and improving their mental-health outcomes,<sup>26</sup> it is currently subject to strong criticisms. Two common objections<sup>27</sup> concern ‘desistance’<sup>28</sup> and

<sup>15</sup>P Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>>.

<sup>16</sup>Although this paper adopts a comprehensive approach towards non-binary identities, the approaches described only concern the recognition of gender identity within the gender binary.

<sup>17</sup>See for instance A Sorlie, ‘Framing Equality: Debating Protected Grounds in the Field of Trans and Non-binary Rights’ in E Brems, P Cannoot, and T Moonen (eds), *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia 2020) 121–44.

<sup>18</sup>E Schneider, ‘Trans Children: Between Normative Power and Self-Determination’ in E Schneider and C Baltes-Löhr, *Normed Children: Effects of Gender and Sex Related Normativity on Childhood and Adolescence* (Transcript Verlag 2018) 167–88, 175.

<sup>19</sup>Ibid. 175.

<sup>20</sup>Ibid. 178; P Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>>.

<sup>21</sup>E Schneider and C Baltes-Löhr, *Normed Children: Effects of Gender and Sex Related Normativity on Childhood and Adolescence* (Transcript Verlag 2018) 175.

<sup>22</sup>SP Minter, ‘Supporting Transgender Children: New Legal, Social, and Medical Approaches’ (2012) 59(3) *Journal of Homosexuality* 422.

<sup>23</sup>Ibid.

<sup>24</sup>S Gridley and others, ‘Youth and Caregiver Perspectives on Barriers to Gender-Affirming Healthcare for Transgender Youth’ (2016) 59(3) *Journal of Adolescent Health* 254.

<sup>25</sup>P Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>>; L Henzel and others, *Back Me Up! The UN Convention on the Rights of the Child and the Rights of Trans Children* (Council of Europe 2016).

<sup>26</sup>SP Minter, ‘Supporting Transgender Children: New Legal, Social, and Medical Approaches’ (2012) 59(3) *Journal of Homosexuality* 422, 426; and P Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>> 295.

<sup>27</sup>Please also note the discussion around the newly coined term ‘rapid-onset gender dysphoria’, which is used by those who oppose gender-affirming approaches for trans youth to allege that some young people would come out as trans due to ‘social contagion’ and/or ‘mental illness’. For a critical appraisal of these claims please refer to F Ashley ‘A Critical Commentary on “Rapid-Onset Gender Dysphoria”’ (2020) 68(4) *The Sociological Review* 779.

<sup>28</sup>N Kennedy, ‘Deferral: The Sociology of Young Trans People’s Epiphanies and Coming Out’ (2020) *Journal of LGBT Youth*, doi:10.1080/19361653.2020.1816244, p 3.

‘detransition’.<sup>29</sup> The former relates to the idea, refuted in scientific literature,<sup>30</sup> that most gender non-conforming children later return to the gender identity assigned at birth. Medical practitioners, however, are increasingly capable of discerning children for whom gender nonconformity represents a temporary variance – for various possible factors – from those for whom gender non-conformity is a core element of their identity.<sup>31</sup> The latter objection<sup>32</sup> deals with cases in which people – specifically young people – who have transitioned later ‘detransition’ back to the gender assigned at birth. While there is a relative paucity of research, studies that are available<sup>33</sup> suggest that detransition is extremely rare, and advocates have argued that it should not be used to foreclose the rights of trans children *tout court*.<sup>34</sup>

Although research focused specifically on the human rights of trans and non-binary children is still quite limited in the Global North, and may be even more so in the Global South, authors are increasingly starting to look at these issues.<sup>35</sup> The literature situates the rights of trans – and less explicitly non-binary – children squarely within the reach of the provisions of the UNCRC, highlighting how, regardless of its lack of explicit recognition of these children’s rights, its interpretation, as well as that of the General Comments of the Committee on the UNCRC, increasingly tend toward including, acknowledging, or referring to the rights of trans and non-binary children.<sup>36</sup> All the above-mentioned authors agree on the fact that, despite encouraging progress, the rights of trans and non-binary children are still overwhelmingly ignored and under-protected, and call for a more substantial consideration of how to improve their lives.

While non-exhaustive in relation to the hugely complex issue of the rights of trans and non-binary children, this section has offered an overview of current debates and limitations on the rights of trans children in relation to the expression of their gender identity

<sup>29</sup>Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>> 375; R Hildebrand-Chupp, ‘More than “Canaries in the Gender Coal Mine”: A Transfeminist Approach to Research on Detransition’ (2020) 68(4) *The Sociological Review* 800.

<sup>30</sup>K Olson, ‘Prepubescent Transgender Children: What We Do and Do Not Know’ (2016) 55(3) *Journal of the American Academy of Child and Adolescent Psychiatry* 155; KR Olson and others, ‘Gender Cognition in Transgender Children’ (2015) 26(4) *Psychological Science* 467.

<sup>31</sup>SP Minter, ‘Supporting Transgender Children: New Legal, Social, and Medical Approaches’ (2012) 59(3) *Journal of Homosexuality* 422, 427.

<sup>32</sup>‘Desistance’ and ‘detransition’ do not entirely designate the same phenomenon, as the former refers to the idea of gender-nonconforming children ‘desisting’ from displaying gender-nonconformity after a specific point in time (i.e., puberty), whereas the latter designates the process whereby an individual who has already transitioned (whether socially, surgically, or both) reverses all or part of that process.

<sup>33</sup>S Danker and others, ‘A Survey Study of Surgeons’ Experience with Regret and/or Reversal of Gender-Confirmation Surgeries’ (2018) 6(9S) *Plastic and Reconstructive Surgery – Global Open* 189; and YLS Smith and others, ‘Sex Reassignment: Outcomes and Predictors of Treatment for Adolescents and Adult Transsexuals’ (2005) 35(1) *Psychological Medicine* 89.

<sup>34</sup>Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>> 325.

<sup>35</sup>E Schneider, ‘An Insight into Respect for the Rights of Trans and Intersex Children’ in L Henzel, R Köhler, A Recher, and K Theurer (eds), *Back me up! The UN Convention on the Rights of the Child and the Rights of Trans Children* (Council of Europe 2016); A Redcay and others, ‘The Arc of Justice: Examining Policies and Laws to Advance the Human Rights of Transgender and Gender Expansive Children’ (2019) 4(3) *Journal of Human Rights and Social Work* 156; S Frödén and A Quennerstedt, ‘The Child as a Gendered Rights Holder’ (2020) 27(2) *Childhood* 143; A Sorlie ‘Legal Gender Meets Reality: A Socio-Legal Children’s Perspective’ (2015) 33(4) *Nordic Journal of Human Rights* 353; K Sandberg, ‘The Rights of LGBTI Children under the Convention of the Rights of the Child’ (2015) 33(4) *Nordic Journal of Human Rights* 337; SP Minter, ‘Supporting Transgender Children: New Legal, Social, and Medical Approaches’ (2012) 59(3) *Journal of Homosexuality* 422; Dunne, ‘The Legal Recognition of Transgender Children’ (2017) <<https://ssrn.com/abstract=3270387>>.

<sup>36</sup>K Sandberg, ‘The Rights of LGBTI Children under the Convention of the Rights of the Child’ (2015) 33(4) *Nordic Journal of Human Rights* 337, 339.



and its reception by their parents, and other adults, such as medical, legal, and other institutional authorities. The next section will explore more explicitly the existing boundaries within recognising and protecting the rights of trans and non-binary children, and will also suggest possible solutions for overcoming these boundaries so that they can be framed as frontiers or immaterial sites where critical and productive encounters are possible.

## Exploring the Boundaries and Frontiers of Children's Rights and Gender Identity

### *Navigating the dichotomy between boundary/frontier in the context of children's rights and gender identity*

The rights of trans and non-binary children can easily be thought of or configured as a new frontier for the wider field of children's rights, given its relative peripheral place within the contemporary literature. However, rather than taking for granted what this configuration as a 'new' frontier may mean, we have interrogated ourselves around the dynamics of border thinking (that is, using decolonial and postcolonial work on borders and frontiers to reflect on social issues and problems), following the trajectory of postcolonial and decolonial studies.<sup>37</sup> The words of Rosalba Icaza<sup>38</sup> are useful to illustrate this epistemological approach:

... border thinking is seen as a 'fracture of the epistemology of the zero point' and as a possibility for a critical re-thinking of the geo and body politics of knowledge, of the modern/colonial foundations of political economy analysis, and of gender ...

For the purpose of this article, adopting border thinking means fracturing the 'zero point'<sup>39</sup> (or point of departure, of origin) of knowledge in relation to children and gender identity, which is often characterised by the existence of boundaries or borders – be they legal, social, or moral – that prescribe if, when, and under which terms it is possible to discuss gender, sexuality, and gender identity in relation to the rights of children. As a result, we have been thinking about the concept of the frontier when discussing children's rights and gender identity. In a symbolic sense, the concept contains the promise of futurity but also a radical potential for possibility, exploration, and, within specific conversations, of 'progress'. Reaching or exploring a frontier means overcoming current limits or widening the space currently known and inhabited.<sup>40</sup> From the perspective of decolonial and postcolonial studies, the idea of the frontier is a productive device used to impose colonial violence and to claim a space as one's own, pretending to forget that the space already belonged to someone, designating it *terra nullius*.<sup>41</sup> It can be

<sup>37</sup>W Mignolo, 'Geopolitics of Sensing and Knowing: On (De)Coloniality, Border Thinking and Epistemic Disobedience' (2011) 14(3) *Postcolonial Studies* 273.

<sup>38</sup>R Icaza, 'Decolonial Feminism and Global Politics: Border Thinking and Vulnerability as Knowing Otherwise' in M Woon and S Weier (eds), *Critical Epistemologies of Global Politics* (E-International Relations Publishing 2017) 26–45.

<sup>39</sup>Very often this 'zero point' of knowledge assumes the contours of paternalistic discourses about children's gender identity which promote the status quo rather than listen to children's voices on these issues.

<sup>40</sup>M Naum, 'Re-emerging Frontiers: Postcolonial Theory and Historical Archaeology of the Borderlands' (2010) 17(2) *Journal of the Archaeological Method and Theory* 101.

<sup>41</sup>This is a Latin expression designating a 'land belonging to nobody'. For a full appraisal of this expression please see Y Hale Hendlin, 'From Terra Nullius to Terra Communis: Reconsidering Wild Land in an Era of Conservation and Indigenous Rights' (2014) 11(2) *Environmental Philosophy* 141.



argued that despite the increasing number of scholars and activists who have addressed the issue of children's rights and gender identity, in common discourse this crucial topic still represents a sort of *terra nullius* of human rights: one in which there is ample space for (adult) colonisation, little attention to those who inhabit the space already (trans and non-binary children), and a strong normative and disciplining drive towards conformity and systematisation of legal and medical knowledge, without proper consultation of the individuals concerned.

The question of what the frontiers of children's rights are is therefore not a neutral one, but one that requires an open acknowledgment of what power dynamics are at stake. Arguing that gender identity represents a new frontier in children's rights implies that this space was previously relatively foreclosed, and is now open for exploration, discussion, perhaps also inappropriate colonisation by adults, potentially including ourselves as the authors of this article.<sup>42</sup> Because of this, we want to be mindful of how we approach gender identity as a frontier topic in children's rights. The concept of the frontier can help navigate the tension between the process of bordering as a limiting, paternalistic process and the opening of a frontier as a democratising process whereby children are put at the centre of knowledge production in relation to gender identity. The concept of the frontier can be either limiting when it comes to children's rights or it can be used as an empowering tool to discover new horizons when children are protagonists in affirming their gender identity.

Decolonial and postcolonial authors have helped to disentangle the ideas of border and frontier from their literal geographical geneses. As Naum suggests,<sup>43</sup> borderlands and frontiers are ambiguous landscapes characterised by fluidity and multiplicity, and zones that can be narrowed to be made into rigid borders. The concept of the borderland is more fluid than that of the border. Gloria Anzaldúa has written that:<sup>44</sup>

A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is a constant state of transition. The prohibited and forbidden are its inhabitants.

Anzaldúa suggests that borderlands and frontiers are spaces in which continuous redefinition is at play. This echoes the work of the Italian anthropologist La Cecla,<sup>45</sup> who distinguishes between the border as an impenetrable space and the frontier as a fuzzy space in which 'misunderstandings' and productive processes of exploration and confrontation can take place. It is therefore possible to think about children's rights and gender identity as a frontier or borderland, following Anzaldúa, rather than as a boundary or border. This frontier is configured as a place where the power relations of knowledge production can be reversed in favour of children's own contributions to the issue of gender identity, rather than remaining anchored to the rigid conception of this potentially new field of investigation and scholarship as one that needs to be tightly policed, bordered, and

<sup>42</sup>We acknowledge that for the purpose of this article children have not been consulted, which presents a strong limitation in relation to its emancipatory and participatory potential, as it remains strongly articulated within an *adult-centred* epistemological approach.

<sup>43</sup>M. Naum, 'Re-emerging Frontiers: Postcolonial Theory and Historical Archaeology of the Borderlands' (2010) 17(2) *Journal of the Archaeological Method and Theory* 101, 101.

<sup>44</sup>G. Anzaldúa, *Borderlands/La Frontera: the New Mestiza* (Spinsters/Aunt Lute 1987) 3.

<sup>45</sup>E. La Cecla, *Il Malinteso: Antropologia dell'Incontro* (Laterza 2009).

delimited by adults who often oppose the idea that children should have a say on their gender identity.

This article offers a critical appraisal of the current limitations of domestic laws and the UNCRC, as well as their potential to create opportunities to effectively address the rights of trans and non-binary children. Following the above discussion on the distinction between a boundary and a frontier, two questions arise: to what extent do the UNCRC and domestic laws represent a frontier for children's gender identity? And in what ways can they enhance access to gender identity for children? Our argument here is twofold. First, the UNCRC and domestic laws mainly function as a boundary rather than as a frontier. This means that, when children's participation concerns aspects of life where the child might challenge heteronormative assumptions, a protectionist and paternalistic view is likely to inform legislative developments and trans and non-binary children will likely not be involved in debates or legislative processes concerning gender identity.<sup>46</sup> Second, to make law a frontier rather than an immovable boundary and escape protectionist and paternalistic approaches a dynamic legal process of *visibilisation* should take place. This involves recognising that trans and non-binary children exist everywhere, and moving from participation, as conceptualised in Art 12 UNCRC, to *protagonismo*. Legal developments would need to draw upon intersectionality, consider the context in which the child grows up, and acknowledge the underlying power dynamics linking gender and age. We argue that children must be involved meaningfully in the several events in which their gender identity is considered. Children's voices should be taken into account in research, legislative processes, and political discussions. Without meaningful involvement, children are not given the opportunity to be protagonists – to be empowered – in decision-making that concerns crucial and intimate spheres of their personal identities, such as their sense of self in relation to their gender.

Although all children are entitled to the rights enshrined in the UNCRC, the UNCRC fails to consider gender identity because no provision explicitly relates to it. Even if gender identity was included in the remit of Article 8, the right to identity, the reality is that most legal systems globally adopt a restrictive view, not allowing children to legally transition<sup>47</sup> or denying or restricting access to puberty-blockers.<sup>48</sup> The narrative is that children are objects of protection who are unable to understand what is happening. Limited access to gender recognition is often justified by arguing that children of a certain age are not capable of understanding the consequences of transition or of exercising their rights.<sup>49</sup>

Manipulation and decontextualised use of the age argument is not limited to gender recognition. As Daiute has suggested,<sup>50</sup> recourse to age, which draws upon a biologically driven conceptualisation of child development, offers easy opportunities to states and legislators to limit children's rights. Age is often given an excuse to hide the real reasons for limiting access to gender recognition. A first real reason is that some

<sup>46</sup>See for instance the lack of children's consultation for the reform of the UK Gender Recognition Act (GRA) of 2004.

<sup>47</sup>For detailed list please see P Dunne, 'The Legal Recognition of Transgender Children' (2017) <<https://ssrn.com/abstract=3270387>>.

<sup>48</sup>See for instance *R (on the application of) Quincy Bell and A -v- Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin).

<sup>49</sup>*Ibid.*

<sup>50</sup>C Daiute, 'The Rights of Children, the Rights of Nations: Developmental Theory and the Politics of Children's Rights' (2008) 64 *Journal of Social Issues* 701.

adults have only limited acceptance of identities that do not conform to heteronormative standards among children. A second reason is that many do not recognise that, regardless of age, trans and non-binary children can express ideas about their gender identity which challenge the status quo – thus breaking boundaries and creating malleable frontiers.

Various factors contribute to the production and stratification of paternalistic and protectionist legal developments concerning children's gender identity. Firstly, adults' stereotypes about gender, gender roles, and gender expression play a role in defining expectations of children. Concurrently, a longstanding stigma derived from the pathologisation of gender identity helps limit access to human rights and justice for children.<sup>51</sup> Lastly, the reality of childhood as a social construction,<sup>52</sup> which is highly dependent on various contexts and factors, often contributes to narrow ideas about what children can do or be. It is well known that law and legal developments do not occur in a vacuum. Legal statutes, case law, and legislative process are all influenced by cultural factors and represent social structures built around power imbalances.

Sharpe has suggested that the law considers transgender people as problematic and even monstrous.<sup>53</sup> Drawing upon that, and assuming that monstrosity implies visibility, we argue that the law sees trans and non-binary children in a way that is characterised by invisibility and incapability. An example of invisibility is the lack of reference to gender in the UNCRC (see UNCRC, art 2), let alone to gender identity. When it comes to incapability, adolescents are often granted greater autonomy than younger children, with great variability among different legal systems.<sup>54</sup> A case in point is the possibility granted by some countries to trans adolescents to change their legal gender without parental approval.<sup>55</sup> As Foucault pointed out, the law represents a system of power which defines its subjects and how they are classified and represented.<sup>56</sup> The arbitrary and heteronormative exercise of power that adults exercise is visible, for instance, in the legal language used to refer to children as 'minors', a linguistic representation of the child as inferior, as a subject to be protected, and as incapable of making decisions.<sup>57</sup>

Some legal systems further create a perverse underlying discrimination between children who do not conform to the binary gender division. They have developed frameworks to consider the needs of trans children – albeit in an arguably puzzling way – but non-binary children are not considered anywhere. Indeed, a levelling assumption that neglects the variety of gender identities that do not conform to the binary model seems to influence even the more progressive legal developments.

<sup>51</sup>See for instance J Pyne, 'Gender Independent Kids: A Paradigm Shift in Approaches to Gender Non-Conforming Children' (2014) 23(1) *The Canadian Journal of Human Sexuality* 1. For a general discussion on depathologisation and human rights, please refer to ME Castro-Peraza, 'Gender Identity: The Human Right of Depathologization' (2019) 16 (6) *International Journal of Environmental Research and Public Health* 978.

<sup>52</sup>SA Norozi and M Torill, 'Childhood as a Social Construction' (2016) 6(2): 75–80 *Journal of Educational and Social Research* 75.

<sup>53</sup>A Sharpe, *Foucault's Monsters and the Challenge of Law* (Routledge 2010).

<sup>54</sup>F Bilotta, 'Transessualismo' in R Sacco (ed), *Digesto delle Discipline Privatistiche, Sez Civ 8° Aggiornamento* (Utet Giuridica 2013) 732–69.

<sup>55</sup>P Dunne, 'The Legal Recognition of Transgender Children' (2017) <<https://ssrn.com/abstract=3270387>> 11.

<sup>56</sup>M Foucault, *The History of Sexuality: An Introduction, Volume 1* (R Hurley tr, Vintage Books 1978).

<sup>57</sup>MF Moscati, 'Bambini e Adolescenti LGBTI: un Approccio Definitorio e le Ragioni di una Indagine Giuridica' (Conference 'La Tutela Giuridica dei Bambini e degli Adolescenti LGBTI. Una Prospettiva Multidisciplinare', Rete Lenford, Venice, 2016).

### ***Critical approaches to the role of parents and adults as boundary-setters***

When thinking about how the law, and the UNCRC more specifically, works more as a boundary than as a frontier in the context of children rights, the role of parents and adults in different authority positions can also be considered. This article focuses on two specific issues: the conceptualisation and use of the principle of the best interests of the child enshrined in Art 3 UNCRC, and the issue of ‘selective listening’ on the part of adults when children express their wishes or opinions on different matters affecting their lives (namely, on gender identity). In this section we look at how the principle of the best interests of the child is characterised by boundaries when it comes to gender and/or sexuality, and how parents and adults more broadly (medical and legal authorities, for example) adopt various modes of selective listening to children which are highly dependent on the topic at hand. This means that adults selectively create boundaries or borders when children express certain ideas or wishes in relation to their gender identity but may be more prone to bringing down boundaries when other issues, such as those that emphasise the dimension of protection, are considered.

The principle of the best interests of the child is enshrined in Art 3 of the UNCRC and represents one of the convention’s four pillars.<sup>58</sup> Over the years an extensive body of literature on the UNCRC has analysed its meaning, its interpretation in various contexts and realms of children’s rights, and its limitations. While it is beyond the scope of this article to engage with these complex debates, we argue that it is important that the principle of the best interests of the child is understood critically in conjunction with the social and cultural genesis of both childhood and gender. Literature has shown that the concept of childhood and the meanings attached to it are created by society, and therefore there is no such thing as a universal child.<sup>59</sup> Gender too is a social construct. A dynamic interpretation of the best interests principle should take into account the impact of both social constructs.

From a sociological perspective, the concept of the best interests of the child is profoundly imbued with socio-cultural constructions of the child as an autonomous being with specific characteristics and needs. It can be suggested that the prefiguration of the child’s ‘interests’ from the part of parents and/or legislators, and/or policymakers is inevitably influenced by the interrelation of heteronormativity, cisnormativity, and ableism that routinely contribute to the creation of a fictional embodiment of the child as a taxonomic category.<sup>60</sup> Indeed, it can be argued that, although the concept of the best interests of the child could be considered malleable enough to be adapted to diverse socio-cultural contexts globally and across cultures and spaces, in practice it is fundamentally based on the tacit legal, social, and cultural assumption of the ‘average’ child as being already inherently heterosexual, cisgender, and able-bodied.<sup>61</sup>

This helps explain how the principle of the best interests of the child is often used as a bordering concept in relation to gender identity – a delimiting device aimed at centring

<sup>58</sup>The other three pillars are the right to non-discrimination (UNCRC, art 2), the right to life, survival, and development (UNCRC, art 6), and the respect for the views of the child (UNCRC, art 12).

<sup>59</sup>C Smart and others, *The Changing Experience of Childhood* (Cambridge University Press 2001).

<sup>60</sup>FR Ammaturo, ‘Raising Queer Children and Children of Queer Parents: Children’s Political Agency, Human Rights and Hannah Arendt’s Concept of ‘Parental Responsibility’ (2019) 22(7-8) *Sexualities* 1149.

<sup>61</sup>*Ibid.*

the paternalist<sup>62</sup> and protectionist<sup>63</sup> approach to children's rights and relegating considerations of the child's self-determination and child-centred approaches to gender identity to the background. Furthermore, the principle of the best interests of the child reveals a possible tension between competing views on what is actually best for the child. As Vandenhoe has argued:<sup>64</sup>

... the meaning of the best interests of the child has remained indeterminate and opaque, so that it tends to be invoked from different sides to justify sometimes opposing decisions.

It is certainly possible to see a potential conflict between the parents' views on what is in the best interests of the child, and the child's views on what is best for them in relation to their gender identity. This opposition between parents' rights and children's rights, ubiquitous in the literature on children's rights and on the UNCRC, can be also understood beyond a dichotomy, as suggested by Reynaert and others.<sup>65</sup> Instead of thinking about parents' rights as creating a border which limits children's rights by deploying the principle of the best interests of the child, it should be possible to consider parental prerogatives as functioning to serve the rights of children.<sup>66</sup> Parents would accordingly only have parental rights insofar as these can function to realise children's rights. While the genesis of the principle of the best interests of the child exists squarely within the cisnormative and heteronormative domain, it can also be queered and mobilised in favour of gender-variant and gender-diverse children thanks to the opacity identified by Vandenhoe.<sup>67</sup> The principle of the best interests of the child can therefore become an important tool to advocate for both medical treatment and legal gender recognition for trans and non-binary children, thus representing a new frontier which allows an expansion of what is effectively in the best interests of the trans and non-binary child.

Although considered universal, the best interests principle does not receive uniform implementation everywhere.<sup>68</sup> Its interpretation, the meanings attached to it, are shaped continuously and non-harmoniously due to social and cultural factors, stigma about certain aspects of life to which best interests is related, diverse cultural approaches to childhood, and specific legal systems. Some legal systems have preferred to use the welfare principle instead.<sup>69</sup> Often the term is used interchangeably with welfare. Other legal systems have not transposed the principle into domestic laws despite having ratified the UNCRC.<sup>70</sup>

<sup>62</sup>M Liebel, 'Paternalism, Participation and Children's Protagonism' (2007) 17(2) *Children Youth and Environments* 56.

<sup>63</sup>D Reynaert and others, 'A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child' (2009) *Childhood* 518.

<sup>64</sup>W Vandenhoe, 'Distinctive Characteristics of Children's Human Rights Law' in E Brems, E Desmet and W Vandenhoe (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 26.

<sup>65</sup>D Reynaert and others, 'A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child' (2009) *Childhood* 518, 525.

<sup>66</sup>*Ibid.* 525.

<sup>67</sup>W Vandenhoe, 'Distinctive Characteristics of Children's Human Rights Law' in E Brems, E Desmet and W Vandenhoe (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 26.

<sup>68</sup>E Sutherland and L Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press 2016).

<sup>69</sup>See for instance, the Children Act 1989 for England and Wales.

<sup>70</sup>This has happened in China, where the Law for the Protection of Minors does not contemplate the best interests principle. See M Palmer, 'Rethinking Children's Rights and Interests: Economic Reform, Social Protection and Legal Culture in Post-Mao China' (2010) 5(2) *Journal of Comparative Law* 260.

However, there is a dearth of data on how the best interests principle is interpreted by adults and perceived by children when issues concerning gender identity and sexual orientation are to be decided. This article therefore calls for further research on the way trans and non-binary children in different part of the world and from varied social backgrounds conceptualise and perceive their best interests.

Yet certain scenarios can be considered in which the principle of the best interests of the child in relation to gender identity might represent a source of dispute and conflict. Firstly, the principle prompts some reflections in the context of dispute resolution, and whether it functions as a boundary or a frontier. Considering its relation to children's gender identity, it can be suggested that the best interests principle might also represent a source of dispute between adults who to different extents are called on to decide on issues concerning children's gender identity, or between the children and adults. Disputes around what is in the best interests of the trans or non-binary child may overlap with disputes on gender identity. Children's gender identity can cause dispute between parents or between parents and their children,<sup>71</sup> and negotiations between parents over what is the best interests of the trans or non-binary child may be informed by stigmas concerning gender identity, which may in turn limit children's rights when gender identity is at stake, or by the idea that the best interests principle can undermine parental authority. Thus the principle ends up being configured as a boundary rather than as a frontier, because it creates an obstacle to children expressing their own views about their gender identity.

Secondly, the principle of the best interests can play a role in social conflicts when gender identity is in discussion. Deciding for instance whether trans and non-binary children can access legal and medical transition, or whether sex education in primary and secondary schools should include learning activities on sexual orientation and gender identity, or whether books about trans and non-binary children could be purchased by school libraries, competing notions of the 'best interests' principle can be mobilised by different social groups.<sup>72</sup> An additional concern here is when adults argue that talking about the gender identity of trans and non-binary children might affect the best interests of non-trans children, creating a false opposition between children who rarely are involved in the debate. Again, the principle here functions as boundary.

A third reflection concerns the perception that trans and non-binary children have of the injustice they incur or suffer. According to Felstiner and others, disputes arise through a process of naming, blaming, and claiming.<sup>73</sup> A pre-condition for creating dispute is the perception of what is wrong. However, the injustice might not be perceived at all due to personal, social, and cultural factors creating grievance apathy.<sup>74</sup> Stigma and structural violence might limit trans and non-binary children's perception of what is wrong. Some interpretations of best interests that do not pay attention to the specific needs and rights of trans and non-binary children, if reiterated and understood as common and monolithic knowledge, may persuade trans and non-binary children

<sup>71</sup>These are among the initial findings of Moscati's ongoing fieldwork on gender identity and dispute resolution.

<sup>72</sup>See for instance the 2019 row over LGBT inclusive education in a Primary School in Birmingham, where parents held conflicting views regarding the 'best interests' of their children: BBC, 'LGBT Teaching Row: Birmingham Primary School Protests Permanently Banned' (26th November 2019) <[www.bbc.co.uk/news/uk-england-birmingham-50557227](http://www.bbc.co.uk/news/uk-england-birmingham-50557227)>.

<sup>73</sup>W Felstiner and others, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980–1981) 15 *Law and Society Review* 631.

<sup>74</sup>*Ibid.*



of the rightness of such interpretations, and so that they are unable to perceive the injustice.

Finally, the principle is applied during the resolution of disputes concerning the upbringing of children. Regardless of the type of mechanism the parties have chosen to resolve a dispute, they are encouraged to prioritise the best interests of the child/children involved. Similarly, the best interests principle guides court decisions concerning children. Sometimes children are involved in the resolution of the disputes and can express their ideas directly, which might help to tailor the interpretation of the principle. But in several cases the best interests of the child builds upon parents' assertions and arguments influenced by gendered ideas of parenthood, or by alignment with the mediator, or simply by emotions.<sup>75</sup> Some may question whether an objectifying interpretation of what *is good for the other* might be considered as appropriate resolution. Conceptualised in this way the principle looks more like a boundary than a frontier. How to make it a frontier, the reader might ask? The answer, as we explain further in the following sections, is to adopt an intersectional and decolonial approach to interpret the best interests and make *protagonismo* a *modus operandi* in all decisions concerning the upbringing of trans and non-binary children.

Contested understandings of the best interests of the child are far from being the only critical aspect of parents' role in relation to children's right to gender identity. Another way in which borders or boundaries are created by adults relates to child's participation and the possibility of having one's voice heard on matters concerning oneself protected by Art 12 UNCRC. This arises when adults and parents selectively listen to children's voices, deciding to ignore or downplay the expression of children's gender identity. As Lundy has commented,<sup>76</sup> the right to participation is a difficult for children to exercise because it requires adults' cooperation, and adults may not always be willing to cooperate. As the overview presented above shows, even within the field of children's rights, the space devoted to discussing gender and sexuality is still particularly compressed.

Selective listening by adults, however, is not in itself sufficient to explain the marginalisation of the voices of trans and non-binary children within the field of children's rights. Current boundaries or borders encountered by trans and non-binary children can also be caused by what Kennedy<sup>77</sup> has called 'cultural cisgenderism', that is, the '... systemic erasure and problematising of trans people and the distinction between trans and cisgender people'. In practice, this means that not only adults may be 'selectively listening' to children's voice as and when they think that is appropriate – and it may not include issues of gender and sexuality – but that the cisnormative character of society itself deprives children of the very vocabulary to think about themselves as being 'trans'. Kennedy has argued that young trans people can go from tacit deferral to discursive deferral only if and when they are able to acquire the specific vocabulary

<sup>75</sup>J Smithson and others, 'The 'Child's Best Interests' as an Argumentative Resource in Family Mediation Sessions' (2015) 17(5) *Discourse Studies* 609.

<sup>76</sup>L Lundy, "'Voice' is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) *British Educational Research Journal* 927, 929.

<sup>77</sup>N Kennedy, 'Prisoners of Lexicon: Cultural Cisgenderism and Transgender Children' in E Schneider, C Baltes-Löhr (eds), *Normed Children: Effects of Gender and Sex Related Normativity on Childhood and Adolescence* (Transcript Verlag 2018) 297–312.



to think beyond cisnormativity.<sup>78</sup> This paves the way to what Kennedy calls the epiphany of a child realising that they are trans or non-binary, thus ending the invisibility of the trans and non-binary child. Selective listening and ‘selective information-giving’ can be considered as two effective ways of putting up boundaries for trans and non-binary children to prevent them arriving at self-actualisation and being ‘protagonists’ in self-determining their gender identity.

### ***Adopting intersectional and decolonial approaches to children’s rights and gender identity***

We opened this discussion with a consideration of the frontier and its colonial meaning in history and postcolonial scholarship. Discussing its colonial genesis, however, does not mean that the concept cannot be transfigured to open empowering forms of legal and sociological advancements in the field of children’s rights in relation to gender identity. We believe that to be fruitfully discussed, issues around gender and sexuality in relation to children’s rights should not be seen as an ideal frontier to be colonised by adult projections of what’s best for children, but as a frontier that children can guide adults to explore under their own terms and conditions. This brings us to consider the necessity of an intersectional approach to children’s rights and gender identity.

So far, such conversations seem to have been predominantly based in the Global North, where increased attention and regulation of the medical and legal protocols for trans and non-binary children have been discussed. However, hegemonic discussions on children’s gender identity as inherently informed by Western theorisations of trans identities risk alienating children who live in the Global South and whose experiences of gender identity and sexuality may be formed within different socio-cultural and legal contexts. For this reason, caution should be exercised, within the exploration of this frontier in children’s rights, to not reproduce the colonising logics previously seen in other areas of human rights protection, particularly in children’s rights, and to centre the experience of children themselves as giving rise to intersectional and decolonial forms of knowledge production on gender diversity in youth and adolescence.

Trans and non-binary children are likely to experience discrimination and invisibility. They may face additional barriers to access to justice, health, learning, and participation. Legal responses addressing these limits should draw upon intersectionality. This means developing measures which acknowledge that discrimination is intersectional, that is, its axes include socio-economic position and privilege, ‘race’ and ethnicity, ability, religion, and so forth. Intersectionality must be added to legal statutes that regulate children’s aspects of life.<sup>79</sup> Judges, social services, mediators, and lawyers must be trained how to use intersectionality as a tool when dealing with legal issues concerning children’s gender identity. And intersectionality must be used to analyse barriers that trans and non-binary children face in accessing justice, health, learning, and participation.

<sup>78</sup>N Kennedy, ‘Deferral: The Sociology of Young Trans People’s Epiphanies and Coming Out’ (2020) *Journal of LGBT Youth*, doi:10.1080/19361653.2020.1816244.

<sup>79</sup>For instance, the Children Act 1989 should be revised by including intersectionality within the factors listed in section 1.

## **Centring children's voices: from participation to protagonismo**

As discussed in a recent article,<sup>80</sup> adults often start from the assumption that children need to be sheltered from politics and retreat to the sanitised, private, idealised sphere of the 'home'. This controversial idea, which sees the child as a naïve, innocent, not-quite-adult human being, denies children's agency and does not consider that their lives are inherently political from birth. In this regard, the concept of *protagonismo infantil* can help us navigate the already inherently political quality of children rights and the misguided idea that it is misguided to think it possible to opt out of the political components of human experience just because of biological age. *Protagonismo infantil* suggests that children assume an active social role and can be at the centre of knowledge production and decision-making. Navigating the medical, legal, social, and cultural tensions that the field of children's rights and gender identity opens is the real challenge when it comes to *protagonismo infantil*, given the ever-pervasive attempt to regulate and discipline children's bodies as a form of social and cultural practice.

The current literature on children's gender identity has not considered the concept of *protagonismo infantil*. Rooted in liberation theology and social movements in Latin America, *protagonismo infantil* has been used for over 40 years by the social movements of working children and adolescents '... to redefine childhood as a social and political collective identity (against the natural assumption) and to argue for children as active subjects who deserve full participation in political life (against the exclusion assumption)'.<sup>81</sup> As suggested by Taft,<sup>82</sup> not only has the meaning of *protagonismo* changed several times depending on relations between social movements and political changes, but when linked to children's rights discourse *protagonismo* has also somehow been reduced to child participation. In reality, *protagonismo* encompasses '... participation, representation, projection, solidarity, self-reflection or identity, autonomy and continuity'.<sup>83</sup>

*Protagonismo infantil* is not an easy concept to define, and discussing its history is outside the scope of this article. However, its three main characteristics, as widely discussed by literature, are important for our endeavour here. First, as summarised by Liebel,<sup>84</sup> it puts children at the centre of society with the capacity to play an essential role in changing society. When compared to Article 12 of the UNCRC, then, *protagonismo* adds a proactive, tangible, dynamic dimension. Children express their ideas and what they say creates tangible changes in their lives and in the community they live. This means that not only children's wishes and ideas are ascertained, but also that those ideas and wishes influence the political and legal decision-making. As Taft points out,<sup>85</sup>

<sup>80</sup>FR Ammaturo, 'Raising Queer Children and Children of Queer Parents: Children's Political Agency, Human Rights and Hannah Arendt's Concept of 'Parental Responsibility' (2019) 22(7-8) *Sexualities* 1149.

<sup>81</sup>J Taft, *The Kids are in Charge* (New York University Press 2019) 63.

<sup>82</sup>J Taft, 'Continually Redefining *Protagonismo*: The Peruvian Movement of Working Children and Political Change, 1976–2015' (2017) 46(5) *Latin America Perspectives* 90.

<sup>83</sup>A Cussiánovich, 'What does Protagonism Mean?' in M Liebel and others (eds), *Working Children's Protagonism: Social Movements and Empowerment in Latina America, Africa and Asia* (2001) (IKO 2001) 61.

<sup>84</sup>M Liebel, 'Paternalism, Participation and Children's Protagonism' (2007) 17(2) *Children, Youth and Environments* 56; and M Liebel, *Children's Rights from Below. Cross-Cultural Perspectives* (MacMillan 2012).

<sup>85</sup>J Taft, *The Kids are in Charge* (New York University Press 2019) 67.

... protagonismo is not simply evidenced in the ability to express oneself or to have a voice within the confines of a pre-structured participatory opportunity but must be assessed by the impact of that self-expression and the extent to which a social group does, in fact, have a role in shaping the story or impacting the political and social world.

When applied to children's gender identity, this characteristic of *protagonismo* would translate into involving children during legislative processes concerning their gender identity, including gender recognition laws, and include their voices in the final output of the legislative process. It is a meaningful participation that can be achieved through *protagonismo*. Hence, it is now time to stop speculating on what is good or bad for trans and non-binary children without involving the children first. That is also true for researchers (including ourselves as authors of this article), as making the above argument without talking to children first entails wrongly proceeding through assumptions about what children think or do not think.

Furthermore, we argue such involvement might encourage the development of a harmonised framework among legal systems and their legal cultures in which trans and non-binary children would be legally entitled to ask for and obtain legal gender recognition. A harmonised legal framework that embraces *protagonismo* would have a positive emotional and mental impact.

A second characteristic of *protagonismo* which is useful here comes from Cussianovich's admonition to avoid reducing it to a neoliberal instrument of autonomy and individualisation. Referring to movements for working children, Cussianovich clarifies that '... although *protagonismo* is an individual right, its practical exercise actually depends on the extent to which working children manage to occupy local, regional, national, and international spaces'.<sup>86</sup> Taft likewise suggests that embedded in the meaning and application of *protagonismo* is the interaction of social groups and their power relations within society.<sup>87</sup> What implications does this collective aspect of *protagonismo* have for children's gender identity? A first outcome would be acknowledgement that trans and non-binary children are a social group found across cultures and times,<sup>88</sup> yet without homogenising the individual identities of these children. The social group of trans children should function as frontier, as discussed earlier, for the expression of each of its members – as a way to celebrate a variety of identities.

A further outcome would be dialogic, respectful intergenerational conversations and partnerships between children and adults. As they are for the movement of working children, adults can be considered allies, collaborators, and partners for trans and non-binary children. These relationships are equal and not characterised by a pre-constructed power hierarchy based on age. In practical terms, in all contexts and domains, including legal, social, and medical, this means adults asking trans and non-binary children how they can help.

Linked to this last consideration is the third dimension of *protagonismo*, namely the relationships between movements which have characterised the use of the concept in Latin America. It is important that several social movements embrace *protagonismo infantil*. Discourse around children's gender identity, including the opportunity for

<sup>86</sup>A Cussiánovich, 'What does Protagonism Mean?' in M Liebel and others (eds), *Working Children's Protagonism: Social Movements and Empowerment in Latina America, Africa and Asia* (IKO 2001).

<sup>87</sup>J Taft, *The Kids are in Charge* (New York University Press 2019).

<sup>88</sup>See our earlier discussion of intersectionality.

legal gender recognition and legal and physical transition for children, is paying the price of sterile debates between social movements led by adults – such as between part of the feminist movement (Trans Exclusionary Radical Feminists [TERFs]) and the trans movement. It is still rare for such movements to talk with trans and non-binary children before incorporating discourse about them. If children are put at the centre, their voices might have the power to re-direct debates concerning more general discourse on gender identity. Their voices have the potential to rejuvenate conversations, debates, and relations between social movements that seem stuck on a binary, patriarchal position to gender identity.

### Whose Views Matter? Some Concluding Thoughts

This article has considered how current social and legal discourse concerning the rights of trans and non-binary children remains peripheral and caught between paternalism and stigma. It is controversial to listen to the voices of trans and non-binary children, and so far their voices are very limited. Invisibilisation, protection and age discourses, and assumptions about gender identity contribute to the limited attention given to the rights of trans and non-binary children and their involvement within decisional processes concerning their lives.

We have suggested that boundaries impeding the full involvement of trans and non-binary children can be overcome by first acknowledging that trans children exist, and then adopting the concept and *modus operandi* of *protagonismo infantil*. Adults, including social rights movements, should accordingly not only listen to the voice of the child, but enable that voice to make practical changes. We have also recommended further research into how trans and non-binary children see their best interests, and into the applicability of intersectionality to legal interpretation and legal developments concerning gender identity.

For some adults, what trans and non-binary children have to say about their identities and how they wish to perform them might not be easy to accept. The risk of selective listening, as we explained earlier, is therefore high. Children may say things that adults do not want to hear, but children's protagonism requires adults to acknowledge children's agency even when it does not match their expectations.

### Acknowledgements

We want to wholeheartedly thank the editors of this Special Issue, Gamze Erdem Türkelli, Wouter Vandenhoe, and Jan Wouters for their invitation to write this paper. We have greatly enjoyed working with them. We also extend our gratitude to our reviewers. Lastly, we also want to thank Karen Da Costa and Peter Johansson for their invitation to discuss an earlier draft of this paper during the Human Rights Seminar at the University of Gothenburg in December 2020.